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2010 JUN 17 AM 11:37

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF LOS ANGELES - CENTRAL DISTRICT

11 CHRISTOPHER LEE DUNN,

12 Plaintiff,

13 -vs-

14 CITY OF BURBANK AND DOES 1
15 THROUGH 25, INCLUSIVE,

16 Defendants.

CASE NO.: BC417928

PLAINTIFF'S NOTICE OF PITCHESS
MOTION; PITCHESS MOTION FOR PEACE
OFFICER RECORDS AND INFORMATION;
MEMORANDUM OF POINTS AND
AUTHORITIES; DECLARATION OF
SOLOMON E. GRESEN IN SUPPORT
THEREOF

DATE: July 9, 2010

TIME: 8:30 a.m.

DEPT: 31

Assigned to: Hon. Alan Rosenfield, Judge
Department 31

21 TO ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD:

22 PLEASE TAKE NOTICE THAT ON July 9, 2010 at 8:30 a.m. in Department 31 of the
23 above-entitled Court, Plaintiff CHRISTOPHER DUNN ("Plaintiff"), will move this Court, pursuant
24 to Penal Code sections 832.7 and 832.8 and Evidence Code sections 1043 and 1045, for an order
25 compelling the Defendant City of Burbank ("Defendant") to produce the personnel records of Eric
26 Rosoff, Dan Yadon, Plaintiff, and other peace officers in which the enumerated categories of
27 documents are maintained. This Motion will be made on the grounds that the records are material to
28 the allegations and causes of action set forth by the Plaintiff.

MOTION FOR PEACE OFFICER RECORDS AND INFORMATION

1 Furthermore, this Motion seeks an order allowing witnesses in this action to disclose, at
2 deposition, information relating to all categories of documents which are sought to be obtained
3 herein, pursuant to Evidence Code sections 1043 and 1045.

4 This Motion shall be based on the attached Points and Authorities, the Declaration of
5 Solomon E. Gresen, the court record on file herein, and all such oral and documentary evidence that
6 shall be presented at the time of the hearing.

7
8 Dated: June 15, 2010

LAW OFFICES OF RHEUBAN & GRESEN

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11 SOLOMON E. GRESEN, Esq.
12 Attorneys for Plaintiff, CHRISTOPHER DUNN
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TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY OF ARGUMENT	1
II. ALL PROCEDURAL REQUIREMENTS HAVE BEEN SATISFIED BY PLAINTIFF	4
III. GOOD CAUSE EXISTS FOR THE RECORDS AND INFORMATION SOUGHT IN DISCOVERY	5
1) <u>The IA Investigation and the Merich Memo</u>	6
2) <u>Officer Dan Yadon's Personnel Records</u>	7
3) <u>Lieutenant Eric Rosoff's Personnel Records</u>	9
4) <u>Burglary Investigation</u>	10
5) <u>Plaintiff's entire personnel file</u>	11
IV. A REASONABLE BELIEF EXISTS THAT THE BURBANK POLICE DEPARTMENT HAS THE RECORDS SOUGHT	11
V. THE COURT SHOULD REVIEW THE DOCUMENTS FOR RELEVANCE AND ORDER THOSE DOCUMENTS, AND TESTIMONY REGARDING THOSE DOCUMENTS, TO BE RELEASED TO PLAINTIFF FOR PURPOSES OF THIS ACTION	12
VI. CONCLUSION	13
DECLARATION OF SOLOMON E. GRESEN	14

TABLE OF AUTHORITIES

State Cases

<i>Alford v. Superior Court</i> (2003) 29 Cal 4th 1033	<u>12</u>
<i>Garden Grove Police Dept. v. Super. Ct.</i> (2001) 89 Cal.App.4th 430, 433	<u>5, 7, 8, 10, 11</u>
<i>Guz v. Bechtel National, Inc.</i> (2000) 24Cal.4th 317, 355-356	<u>6</u>
<i>People v. Hustead</i> , (1999) 74 Cal. App. 4th 410	<u>5</u>
<i>Pitchess v. Superior Court</i> (1974) 11 Cal.3d 531	<u>4, 5, 12</u>
<i>Yanowitz v. L'Oreal USA, Inc.</i> (2005) 36 Cal. 4th 1028, 1042	<u>8, 9</u>
<i>Zanone v. The City of Whittier</i> (2008) 162 Cal.App. 4 th 174	<u>5-11</u>

Statutes

California <u>Evidence Code</u> Section 1043	<u>4, 5, 11, 12</u>
California <u>Evidence Code</u> Section 1045	<u>5, 11, 12</u>
California <u>Evidence Code</u> Section 250	<u>6</u>
California <u>Evidence Code</u> Section 915	<u>12</u>
<u>Government Code</u> Section 3306.5(b)	<u>11</u>

Federal Cases

<i>Mariani-Colon v. Department of Homeland Security ex rel. Chertoff</i> (1 st Cir. 2007) 511 F.3d 216, 224	<u>8</u>
<i>Passantino v. Johnson & Johnson Consumer Products, Inc.</i> (9 th Cir. 2000) 212 F.3d 493, 507	<u>8</u>

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

3 The case presents as an action for wrongful termination and assorted claims under the Fair
4 Employment and Housing Act ("FEHA") as well as violations of the Public Safety Officers
5 Procedural Bill of Rights ("POBRA") brought by Christopher Lee Dunn ("Plaintiff") against the
6 Burbank Police Department ("BPD") / City of Burbank. Plaintiff is Asian-American.

7 At the time of his termination, Plaintiff was the most highly decorated police officer at the
8 BPD. After years of hard work, and an exemplary performance record, Plaintiff was promoted to
9 detective and selected an assignment as the narcotics detective in the Special Enforcement Detail
10 ("SED") unit. Prior to his arrival at the SED, Plaintiff was told that the incoming Caucasian officers
11 in the SED wanted him to choose another assignment, as the Caucasian officers did not want an
12 Asian detective. Nevertheless, in September 2006, Plaintiff was assigned to the SED under the
13 supervision of Sgt. Duran, and began to quietly outperform all of the Caucasian officers in the SED
14 including, without limitation, Sgt. Dan Yadon.

15 Over time, Plaintiff complained several times to his supervisors about Sgt. Yadon's use of
16 race-based remarks and epithets towards him while on the job. Plaintiff is informed and believes
17 that an investigation into the matter resulted in discipline to Sgt Yadon, who was in any event
18 demoted and reassigned to the patrol division. As more fully described below, Yadon's best friend
19 and business partner, Lt. Eric Rosoff, later attempted to coerce BPD Sgt. Thor Merich to provide
20 untruthful testimony against Plaintiff.

21 Just a few weeks after Yadon was demoted, Plaintiff received his first complaint as an officer
22 at the BPD. In the complaint, Plaintiff was accused of "tipping off" a drug dealer informant
23 ("Informant Doe") of a pending investigation by the Culver City Police Department ("CCPD").
24 Informant Doe had previously been Plaintiff's informant in a number of narcotics cases, so when
25 Plaintiff heard that the CCPD was interested in her, Plaintiff called Sgt. Duran to discuss. Plaintiff
26 was told to continue working with Informant Doe.

27 Informant Doe was later arrested by the CCPD, and was charged with possession of 2 ounces
28 of "dope" with intent to sell. Over the duration of a grueling 6-7 hour interview, in which Informant

1 Doe initially and repeatedly denied receiving any information from Plaintiff concerning CCPD's
2 involvement, Informant Doe was worn down and, in exchange for her release, agreed to testify that
3 Plaintiff had indeed "tipped her off" of the impending arrest. (Though this does not explain why the
4 Confidential Informant still had 2 ounces of "dope" in her possession at the time of the arrest.)

5 The very next day, Informant Doe wrote a 14 page letter to the CCPD, recanting her story and
6 indicating that the only reason that she told them that Plaintiff had tipped her off was because they
7 promised to let her go home instead of being arrested. For her troubles, plaintiff is informed and
8 believes that Informant Doe was promptly rearrested and charged. Plaintiff was then placed on
9 Administrative Leave with pay pending an investigation.

10 In the first few weeks of the BPD investigation ("Informant Investigation"), Burbank PD
11 investigator Lt. Eric Rosoff (Yadon's best friend and business partner) was assigned to investigate.
12 In Lt. Rosoff's first interview with Informant Doe, Plaintiff is informed and believes that she again
13 recanted all of her initial testimony, and indicated that Plaintiff did not tip her off. Lt. Rosoff then
14 contacted Sgt. Thor Merich, who was one of Plaintiff's supervisors at the time of the alleged
15 complaint and a direct witness. Lt. Rosoff proceeded to tell Sgt. Merich to "forget what he knows"
16 about Plaintiff's case when interviewed by investigators. Plaintiff is informed and believes, however,
17 that Sgt. Merich defied Lt. Rosoff and refused to alter his testimony about Plaintiff.

18 Thereafter, Sgt. Merich notified his supervisor Omar Rodriguez of this unethical conduct and
19 wrote a formal memo detailing the retaliatory incident (hereinafter, the "Merich Memo"). Plaintiff
20 specifically seeks the "Merich Memo" by way of the within motion, as it bears directly upon
21 unlawful conduct by officers of the Burbank Police Department in the investigation which
22 purportedly lead to Plaintiff's termination. It is unknown whether Lt. Rosoff was ever investigated
23 or disciplined for this conduct, or if any action was taken as a result of the Merich Memo. As a
24 result, and as more fully described below, Plaintiff needs not only to receive the Merich Memo for
25 use in this case, but also to be allowed to depose witness regarding the facts and circumstances
26 regarding the Merich Memo, the investigation and discipline of Lt. Rosoff (if any), and all matters
27 related to the investigation.)

28 //

1 Furthermore, and during the time that Plaintiff was on administrative leave, he was ordered
2 to appear for several court appearance involving Informant Doe. Plaintiff learned at that time that
3 some of the case files regarding those suspects - which were supposed to be locked in the narcotics
4 office - were missing. Further investigation revealed that Plaintiff's locked desk had been forced
5 open, and that files of the department along with Plaintiff's personal records, logs and notes were
6 stolen. Thereafter, Plaintiff is informed that an informal investigation was initiated into the break-in
7 of the narcotics office (hereinafter, the "Burglary Investigation"). As more fully described below,
8 Plaintiff requests to be allowed to fully inquire into the Burglary Investigation at deposition, and
9 obtain any documents generated in furtherance thereof.

10 As a result of the informant investigation, a Brady Letter was issued to Plaintiff, which
11 concluded that Plaintiff had committed certain violations of ethical conduct by tipping off Informant
12 Doe. Chief Stehr then issued a letter of termination for Plaintiff on the same grounds as the Brady
13 Letter.

14 Plaintiff has clearly been treated differently than similarly situated members of the BPD.
15 Rosoff himself later became the subject of his own internal investigation involving the kidnap and
16 assault of a suspect in custody under color of authority . During this investigation (with much more
17 serious charges than those against the Plaintiff), Rosoff was sent to patrol duty rather than
18 administrative leave like the Plaintiff, where he received the benefit of overtime (an average of
19 \$25,000 per year for most officers). After his complaint was presented as "sustained," Chief Stehr
20 refused to proceed against him and hired an outside law firm to clear Rosoff's name. This is the
21 same Lt. Rosoff who was accused of attempting to coerce Sgt. Merrich to change his testimony
22 regarding Plaintiff to investigators.

23 Accordingly, and as described in much more detail below, Plaintiff requests by the within
24 motion the information contained in the personnel filed of Lt. Rosoff and Officer Yadon, and has
25 narrowly tailored this Pitchess motion for that purpose. Further, Plaintiff should be allowed to ask
26 questions about the documents as well as the categories enumerated below at depositions of
27 witnesses in this matter without being subject to an instruction not to answer on Pitchess grounds.
28 These witnesses include, but are not limited to Eric Rosoff, Dan Yadon, Tim Stehr, Thor Merich, a

1 Person Most Knowledgeable from LA-CLEAR, as well as Victor Lewandowski, Michael Webb,
2 Charles Koffman, and Gerardo Misquez, whose declarations appear prominently in Defendant
3 BPD's pending Motion for Summary Judgment.

4 **II. ALL PROCEDURAL REQUIREMENTS**

5 **HAVE BEEN SATISFIED BY PLAINTIFF**

6 Disclosure of a peace officer's personnel records are expressly subject to disclosure under
7 California Evidence Code Section 1043 (codifying Pitchess v. Superior Court (1974) 11 Cal.3d 531)
8 which states, in part:

9 " (a) In any case in which discovery or disclosure is sought of peace or custodial
10 officer personnel records... the party seeking the discovery or disclosure shall file a written
11 motion with the appropriate court or administrative body upon written notice to the
12 governmental agency which has custody and control of the records.

13 (b) The motion shall include all of the following:

14 (1) Identification of the proceeding in which discovery or disclosure is sought,
15 the party seeking discovery or disclosure, the peace or custodial officer whose records
16 are sought, the governmental agency which has custody and control of the records,
17 and the time and place at which the motion for discovery or disclosure shall be heard.

18 (2) A description of the type of records or information sought.

19 (3) Affidavits showing good cause for the discovery or disclosure sought,
20 setting forth the materiality thereof to the subject matter involved in the pending
21 litigation and stating upon reasonable belief that the governmental agency identified
22 has the records or information from the records."

23 Plaintiff has met each of these requirements. In compliance with Section 1043(b)(1),
24 Plaintiff has identified the proceeding (the present action), the party (plaintiff), the officers whose
25 records are sought (Eric Rosoff, Dan Yadon, and Plaintiff Dunn), the governmental agency in control
26 of the records (the City of Burbank), and the time and place for the motion.

27 In compliance with Section 1043(b)(2), the records and information sought are described as
28 Plaintiff Dunn's entire personnel file, the personnel file of Officer Dan Yadon (particularly relating

1 to matters involving his transfer from the Narcotics detail and his demotion), the personnel file of Lt.
2 Eric Rosoff (including, without limitation, any investigation or discipline resulting from telling Sgt
3 Thor Merich to lie in the Dunn investigation, and the kidnaping investigation and reasons for failure
4 to discipline), as well as information and records concerning the Burglary Investigation, and all
5 records the reasons for Plaintiff Dunn's termination, including the investigation, decision-making
6 and "Brady" processes, wherever kept or maintained by the City.

7 In compliance with Section 1043(b)(3), declarations are attached showing good cause for the
8 discovery requested. The attached declarations establishes good cause for the discovery of these
9 records, and sets forth their materiality to this litigation and states upon reasonable belief that
10 Defendant County is in possession of these records. This is explained more fully, below, in Section
11 III.

12 Therefore, Plaintiff respectfully maintains that he has met the procedural requirements of a
13 "Pitchess" motion in this case.

14 **III. GOOD CAUSE EXISTS FOR THE RECORDS**
15 **AND INFORMATION SOUGHT IN DISCOVERY**

16 Under Evidence Code Section 1043(b)(3), Plaintiff must show that he has good cause for the
17 release of the personnel records and information. Good cause is a two-part test, shown by first
18 demonstrating the materiality of the information to the pending litigation, and second by stating upon
19 reasonable belief that the agency has the records or information at issue. "This two-part showing of
20 good cause is a **relatively low threshold** for discovery." Zanone v. The City of Whittier (2008) 162
21 Cal.App. 4th 174 at 187 (Emphasis added)(internal citation omitted).

22 Evidence Code sections 1043 and 1045 do not limit discovery of confidential information
23 from police officer personnel files to the types of information mentioned in the statutes or to the facts
24 embraced by Pitchess, **because the government cannot invoke the privilege to withhold relevant**
25 **evidence.** (Garden Grove Police Dept. v. Super. Ct. (2001) 89 Cal.App.4th 430, 433. For the same
26 reason, Pitchess motions may also be used to discover information to impeach an officer's
27 credibility. (People v. Hustead, (1999) 74 Cal. App. 4th 410 at 417; Garden Grove, *supra*, 89 Cal.
28 App. 4th at 433).

1 Therefore, not only should the following documents be produced following an in camera
2 hearing, but Plaintiff should be allowed to proceed with a line of questioning about the following
3 items or categories of items at deposition:

4 **1) The IA Investigation and the Merich Memo:**

5 The primary inquiry under Zanone v. The City of Whittier, above, concerns whether the
6 documents or information are material or relevant to the pending litigation. *Supra*, 162 Cal.App.4th
7 at 187. The second inquiry (i.e., whether the City of Burbank is in possession of the records or
8 information at issue) is not disputed, as the Merich Memo, IA investigation paperwork and BPD
9 officers are all under the control of the City of Burbank.

10 In the present action, Plaintiff maintains that his termination was discriminatory (based upon
11 his Asian race) and retaliatory (for his reporting of Officer Yadon's racist remarks). As in all such
12 cases, the employer-defendant must articulate a "legitimate nondiscriminatory reason" for the
13 adverse employment action (termination of Plaintiff Dunn). Guz v. Bechtel National, Inc. (2000) 24
14 Cal.4th 317, 355-356.

15 Accordingly, the City has articulated performance-based "nondiscriminatory" reasons for
16 Plaintiff's termination. Specifically, the City maintains that Plaintiff Dunn "tipped" the Confidential
17 Informant of his impending arrest by the Culver City PD. The City conducted an Internal Affairs
18 ("IA") investigation which, purportedly, supported its findings and Dunn's termination. By this
19 motion, Plaintiff wishes to conduct discovery into this particular IA investigation, and obtain any
20 relevant evidence (as described in Evidence Code section 250) pertaining to the investigation
21 including, without limitation, the Merich Memo.

22 Plaintiff respectfully maintains that by relying on the IA investigation to support Plaintiff
23 Dunn's termination, the Defendant City has placed the entire IA investigation and decision-making
24 process at issue in this case. This includes, without limitation, the manner in which evidence
25 allegedly supporting Plaintiff Dunn's termination was obtained, the content of the information upon
26 which the decision to terminate was based, and whether or not there existed any exculpatory
27 evidence concerning any impropriety in the investigation process.

28 //

1 Plaintiff wishes to learn the identities of all BPD officers involved in the investigation, and
2 obtain discovery (including depositions) therefrom concerning their respective roles in the
3 investigation, and all actions taken by them in furtherance of the investigation. Plaintiff also wishes
4 to learn the identities of all BPD officers involved in the decision-making process resulting in his
5 termination, and to obtain discovery (including depositions) therefrom concerning their respective
6 roles in the termination, and all actions taken by them in furtherance of the termination. Presumably,
7 this includes Lt. Rosoff and Chief Tim Stehr.

8 Plaintiff also seeks by this motion to obtain the Merich Memo from the City. The Merich
9 Memo describes misconduct (if not outright criminal behavior) on the part of Lt. Rosoff during the
10 IA investigation at issue in this case. Any effort to tamper or manipulate the outcome of the IA
11 investigation may well demonstrate that the Defendant City's alleged "nondiscriminatory" reason for
12 the termination was actually pretextual. As such, the Merich Memo is material and relevant to the
13 pending litigation.

14 It should again be noted that "**the government cannot invoke the (Pitchess) privilege to**
15 **withhold relevant evidence.**" (Garden Grove Police Dept. v. Super. Ct., *Supra*, 89 Cal.App.4th
16 430, 433. (Emphasis added.) Therefore, and pursuant to the holding in Zanone v. The City of
17 Whittier, *Supra*, 162 Cal.App.4th at 187, above, Plaintiff respectfully maintains that the "**relatively**
18 **low threshold for discovery**" has been met in this case, such that Plaintiff should properly be
19 allowed to conduct discovery into the IA investigation and obtain the Merich Memo as described
20 above.

21 **2) Officer Dan Yadon's Personnel Records:**

22 As above, the primary inquiry under Zanone v. The City of Whittier, above, concerns
23 whether the documents or information are material or relevant to the pending litigation. *Supra*, 162
24 Cal.App.4th at 187. The second inquiry (i.e., whether the City of Burbank is in possession of the
25 records or information at issue) is not disputed, as the personnel file of Dan Yadon, IA investigation
26 paperwork and BPD officers are all under the control of the City of Burbank.

27 In the present action, Plaintiff maintains that his termination was, at least in part, in
28 retaliation for Plaintiff's reporting of Officer Dan Yadon's racist remarks and statements while

1 Plaintiff was working in the Narcotics detail. Under the holding in Yanowitz v. L'Oreal USA, Inc.
2 (2005) 36 Cal. 4th 1028, 1042, then, Plaintiff Dunn must prove that a "causal link" exists between
3 the protected activity (i.e., the complaints of racist remarks) and his termination.

4 Certainly, the proximity in time (only a few weeks between Plaintiff's complaints of
5 Yadon's racist remarks and Plaintiff Dunn's being placed on Administrative Leave) augers in favor
6 establishing the "causal link" described by the Supreme Court in Yanowitz, above: "[s]pecifically,
7 when adverse employment decisions are taken within a reasonable period of time after complaints of
8 discrimination have been made, **retaliatory intent may be inferred.**" Passantino v. Johnson &
9 Johnson Consumer Products, Inc. (9th Cir. 2000) 212 F.3d 493, 507; Mariani-Colon v. Department
10 of Homeland Security ex rel. Chertoff (1st Cir. 2007) 511 F.3d 216, 224 (temporal proximity (2
11 months) between protected activity and discharge sufficient for relatively light burden of establishing
12 prima facie case of retaliation).

13 Therefore, Plaintiff wishes to conduct discovery into Officer Dan Yadon's personnel file
14 (including, without limitation, the taking of depositions) to determine whether Officer Yadon
15 actually was demoted and/or disciplined for making racist remarks to Plaintiff Dunn. Plaintiff must
16 have access to how the BPD handled his complaints of harassment, the role it played in Dan Yadon's
17 demotion, why Yadon was demoted to patrol, how Yadon was notified, and how Yadon responded to
18 the allegations. Plaintiff also wishes to explore by way of discovery the exact nature of the
19 relationship between Officer Yadon and Lt. Rosoff, who attempted to illegally influence Sgt. hor
20 Merich's testimony to the IA investigators as described above. This alos will aid Plaintiff in
21 establishing the "causal connection" identified in Yanowitz, above.

22 It should again be noted that "**the government cannot invoke the (Pitchess) privilege to**
23 **withhold relevant evidence.**" (Garden Grove Police Dept. v. Super. Ct., *Supra*, 89 Cal.App.4th
24 430, 433. (Emphasis added.) Therefore, and pursuant to the holding in Zanone v. The City of
25 Whittier, *Supra*, 162 Cal.App.4th at 187, above, Plaintiff respectfully maintains that the "**relatively**
26 **low threshold for discovery**" has been met in this case, such that Plaintiff should properly be
27 allowed to conduct discovery into Officer Yadon's personnel file and his relationship with Lt.
28 Rosoff.

1 **3) Lieutenant Eric Rosoff's Personnel Records:**

2 As above, the primary inquiry under Zanone v. The City of Whittier, above, concerns
3 whether the documents or information are material or relevant to the pending litigation. *Supra*, 162
4 Cal.App.4th at 187. The second inquiry (i.e., whether the City of Burbank is in possession of the
5 records or information at issue) is not disputed, as the personnel file of Eric Rosoff, IA investigation
6 paperwork and BPD officers are all under the control of the City of Burbank.

7 In the present action, Plaintiff maintains that his termination was affected by the unlawful
8 efforts of Lt. Eric Rosoff. As more fully explained above, Lt. Rosoff is the best friend and business
9 partner of Officer Dan Yadon. Under the holding in Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal.
10 4th 1028, 1042, then, Plaintiff Dunn must prove that a "causal link" exists between the protected
11 activity (i.e., the complaints of racist remarks against Yadon) and Plaintiff's termination.

12 Plaintiff maintains that the close personal and business relationship between Lt. Rossoff and
13 Officer Yadon gives rise to an issue of whether Lt. Rosoff's conduct in attempting to influence Sgt
14 Thor Merich's testimony in Plaintiff's IA investigation was retaliatory in nature or otherwise
15 unlawful.

16 Therefore, Plaintiff wishes to conduct discovery into Lieutenant Eric Rosoff's personnel file
17 (including, without limitation, the taking of depositions) to determine whether Lt. Rossoff actually
18 was investigated and/or reprimanded for the conduct described in the Merich Memo. Plaintiff also
19 wishes to explore by way of discovery the exact nature of the relationship between Officer Yadon
20 and Lt. Rosoff, as more fully described above.

21 In addition, Plaintiff is informed and believes that a review of Lt. Rosoff's personnel file will
22 reveal that an investigation into a kidnaping charge in 2007/2008 against Lt. Rosoff was sustained by
23 the BPD Deputy Chief and a top Lieutenant. Nevertheless, then Chief Tim Stehr refused to
24 discipline Lt. Rosoff, and instead hired outside lawyers to refute the conclusion of his top officers.
25 Plaintiff believes that this is evidence of disparate treatment of officers by the Burbank Police
26 Department, and is material and relevant to prove that Officer Dunn's discipline (termination) was
27 not appropriate under the circumstances, among other things. This also will aid Plaintiff in
28 establishing the "causal link" identified in Yanowitz, above.

1 It should again be noted that **“the government cannot invoke the (Pitchess) privilege to**
2 **withhold relevant evidence.”** (Garden Grove Police Dept. v. Super. Ct., *Supra*, 89 Cal.App.4th
3 430, 433. (Emphasis added.) Therefore, and pursuant to the holding in Zanone v. The City of
4 Whittier, *Supra*, 162 Cal.App.4th at 187, above, Plaintiff respectfully maintains that the **“relatively**
5 **low threshold for discovery”** has been met in this case, such that Plaintiff should properly be
6 allowed to conduct discovery into Lt. Rosoff’s personnel file and his relationship with Officer
7 Yadon.

8 **4) Burglary Investigation:**

9 As above, the primary inquiry under Zanone v. The City of Whittier, above, concerns
10 whether the documents or information are material or relevant to the pending litigation. *Supra*, 162
11 Cal.App.4th at 187. The second inquiry (i.e., whether the City of Burbank is in possession of the
12 records or information at issue) is not disputed, as the Burglary Investigation, and all paperwork
13 attendant thereto, are under the control of the City of Burbank.

14 In the present action, Plaintiff maintains that crucial exculpatory documents were stolen from
15 his locked desk in his office. Interestingly, Lt. Rosoff had motive (as Yadon’s best friend and
16 business partner) and opportunity (Lt. Rosoff had the key to the offices) to commit the crime. **It is**
17 **Plaintiff’s belief that the burglary investigation, along with the reports and all documents**
18 **attendant thereto, are not personnel records and Plaintiff should be allowed to conduct**
19 **discovery freely without the Pitchess motion.** Nevertheless, this motion is being filed in an
20 abundance of caution, and so Plaintiff may proceed through discovery without further motions of this
21 type.

22 It should again be noted that **“the government cannot invoke the (Pitchess) privilege to**
23 **withhold relevant evidence.”** (Garden Grove Police Dept. v. Super. Ct., *Supra*, 89 Cal.App.4th
24 430, 433. (Emphasis added.) Therefore, and pursuant to the holding in Zanone v. The City of
25 Whittier, *Supra*, 162 Cal.App.4th at 187, above, Plaintiff respectfully maintains that the **“relatively**
26 **low threshold for discovery”** has been met in this case, such that Plaintiff should properly be
27 allowed to conduct discovery into the Burglary Investigation as more fully described above.

28 //

1 **5) Plaintiff's entire personnel file:**

2 Defendants have refused to produce a full and complete copy of Plaintiff Dunn's BPD
3 personnel file. This is needed to prove Plaintiff's high level of performance throughout Plaintiff's
4 career with the BPD such as the level of training, promotions, written evaluations, commendations
5 and awards he received. Full access to his benefits and financial records will help to fully establish
6 Plaintiff's damages claims as a result of the wrongful conduct at the hands of the Defendants.
7 Furthermore, any negative items such as reprimands or admonishments that may appear in his
8 personnel file should also be disclosed so that Plaintiff is not unfairly prejudiced by their surprise at
9 trial.

10 Additionally, Plaintiff is entitled to his entire personnel file under POBRA (Government
11 Code Section 3306.5(b), which states: "Each employer shall keep each public safety officer's
12 personnel file or a true and correct copy thereof, and shall make the file or copy thereof available
13 within a reasonable period of time after a request therefor by the officer."). As the records and
14 information sought are material to this litigation, their discovery is proper pursuant to Evidence Code
15 sections 1043 and 1045.

16 It should again be noted that "**the government cannot invoke the (Pitchess) privilege to**
17 **withhold relevant evidence.**" (Garden Grove Police Dept. v. Super. Ct., *Supra*, 89 Cal.App.4th
18 430, 433. (Emphasis added.) Therefore, and pursuant to the holding in Zanone v. The City of
19 Whittier, *Supra*, 162 Cal.App.4th at 187, above, Plaintiff respectfully maintains that the "**relatively**
20 **low threshold for discovery**" has been met in this case, such that Plaintiff should properly be
21 allowed to his own personnel file as more fully described above.

22 **IV. A REASONABLE BELIEF EXISTS THAT THE**
23 **BURBANK POLICE DEPARTMENT HAS THE RECORDS SOUGHT**

24 Under Evidence Code section 1043(b)(3) the Plaintiff must state "upon reasonable belief that
25 the governmental agency identified has the records or information from the records." The
26 Declaration of Solomon E. Gresen, filed concurrently with this Motion, states that Plaintiff has
27 reasonable belief that the BPD has the records, since the BPD would necessarily maintain personnel
28 records of its employees, which would include complaints, investigations into conduct, discipline,

1 grievances, demotions, transfers, reprimands, warnings, POBRA notices or other actions. With
2 specific reference to the Merich Memo, Plaintiff was ordered to return all copies of said memo on
3 January 7, 2010 to Defendant, so Defendant is obviously in possession. Furthermore, as Defendant
4 BPD handled the informant investigation, it is in possession of those files as well. Therefore,
5 Plaintiff has a reasonable belief that BPD is in possession of all of the records sought herein.

6 **V. THE COURT SHOULD REVIEW THE DOCUMENTS FOR RELEVANCE AND**
7 **ORDER THOSE DOCUMENTS, AND TESTIMONY REGARDING THOSE DOCUMENTS,**
8 **TO BE RELEASED TO PLAINTIFF FOR PURPOSES OF THIS ACTION**

9 A finding of "good cause" under Evidence Code § 1043(b) is the first step in the Pitchess
10 process. In addition to the exclusion of specific categories of information from disclosure, Evidence
11 Code § 1045 next establishes general criteria to guide the court's determination for disclosure of
12 relevant information and insure that the privacy interests of the officers subject to the Pitchess
13 motion are protected. Alford v. Superior Court (2003) 29 Cal 4th 1033. Evidence Code § 1045(b)
14 provides that the court shall then examine the information "in chambers" in conformity with
15 Evidence Code § 915 (i.e. out of the presence of all persons except the person authorized to claim
16 the privilege and such other persons as he or she is willing to have present), and shall exclude from
17 disclosure several enumerated categories of information, including: (1) complaints "concerning
18 conduct occurring more than five years before the event or transaction that is the subject of the
19 litigation," (2) the conclusions of any officer investigating a criminal complaint, and (3) facts which
20 are so remote as to make disclosure of little or no practical benefit. Ibid.

21 To help guide the Court in making its determination, Plaintiff is not seeking any information
22 regarding complaints concerning conduct that dates earlier than June 1996 (five years prior to his
23 hire by the BPD). (See Evidence Code Section 1045(b)(1)). Evidence Code Section 1045(b)(2) does
24 not apply since this is not a criminal proceeding. Finally, Plaintiff has conveyed the direct relevance
25 of the categories sought in Section IV of motion and in the attached declaration.

26 //

27 //

28 //

1 Therefore, Plaintiff urges the Court to review the documents in camera and allow Plaintiff his
2 right of access to the documents. Further, Plaintiff asks that the Court allow Plaintiff access to
3 testimony regarding the documents and categories above, as information that the Court finds
4 "relevant" may only be discovered during the deposition of witnesses.

5 **VI. CONCLUSION**

6 As Plaintiff has established good cause for the production of the peace officer personnel
7 records sought herein, the Court should grant this motion.

8
9 DATE: June 15, 2010

LAW OFFICES OF RHEUBAN & GRESEN

10
11 By: 
12 Solomon E. Gresen
13 Attorneys for Plaintiff, Christopher Lee Dunn
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DECLARATION OF SOLOMON E. GRESSEN

I, Solomon E. Gressen, declare as follows:

1. I am an attorney at law, duly admitted to practice before all courts of the State of California and am an associate in the Law Offices of Rheuban & Gressen, attorneys of record herein for Plaintiff, Christopher Dunn ("Plaintiff").

2. This is an action for wrongful termination, discrimination, harassment, retaliation under the Fair Employment and Housing Act ("FEHA") and violations of the Public Safety Officers Procedural Bill of Rights ("POBRA") brought by Plaintiff Det. Christopher Lee Dunn ("Plaintiff") against the Burbank Police Department ("BPD") and the City of Burbank.

3. The case presents as an action for wrongful termination and assorted claims under the Fair Employment and Housing Act ("FEHA") as well as violations of the Public Safety Officers Procedural Bill of Rights ("POBRA") brought by Christopher Lee Dunn ("Plaintiff") against the Burbank Police Department ("BPD") / City of Burbank. Plaintiff is Asian-American.

4. At the time of his termination, Plaintiff was the most highly decorated police officer at the BPD. After years of hard work, and an exemplary performance record, Plaintiff was promoted to detective and selected an assignment as the narcotics detective in the Special Enforcement Detail ("SED") unit. Prior to his arrival at the SED, Plaintiff was told that the incoming Caucasian officers in the SED wanted him to choose another assignment, as the Caucasian officers did not want an Asian detective. Nevertheless, in September 2006, Plaintiff was assigned to the SED under the supervision of Sgt. Duran, and began to quietly outperform all of the Caucasian officers in the SED including, without limitation, Sgt. Dan Yadon.

5. Over time, Plaintiff complained several times to his supervisors about Sgt. Yadon's use of race-based remarks and epithets towards him while on the job. Plaintiff is informed and believes that an investigation into the matter resulted in discipline to Sgt Yadon, who was in any event demoted and reassigned to the patrol division. As more fully described below, Yadon's best friend and business partner, Lt. Eric Rosoff, later attempted to coerce BPD Sgt. Thor Merich to provide untruthful testimony against Plaintiff.

//

1 6. Just a few weeks after Yadon was demoted, Plaintiff received his first complaint as an
2 officer at the BPD. In the complaint, Plaintiff was accused of "tipping off" a drug dealer informant
3 ("Informant Doe") of a pending investigation by the Culver City Police Department ("CCPD").
4 Informant Doe had previously been Plaintiff's informant in a number of narcotics cases, so when
5 Plaintiff heard that the CCPD was interested in her, Plaintiff called Sgt. Duran to discuss. Plaintiff
6 was told to continue working with Informant Doe.

7 7. Informant Doe was later arrested by the CCPD, and was charged with possession of 2
8 ounces of "dope" with intent to sell. Over the duration of a grueling 6-7 hour interview, in which
9 Informant Doe initially and repeatedly denied receiving any information from Plaintiff concerning
10 CCPD's involvement, Informant Doe was worn down and, in exchange for her release, agreed to
11 testify that Plaintiff had indeed "tipped her off" of the impending arrest. (Though this does not
12 explain why the Confidential Informant still had 2 ounces of "dope" in her possession at the time of
13 the arrest.)

14 8. The very next day, Informant Doe wrote a 14 page letter to the CCPD, recanting her
15 story and indicating that the only reason that she told them that Plaintiff had tipped her off was
16 because they promised to let her go home instead of being arrested. For her troubles, plaintiff is
17 informed and believes that Informant Doe was promptly rearrested and charged. Plaintiff was then
18 placed on Administrative Leave with pay pending an investigation.

19 9. In the first few weeks of the BPD investigation ("Informant Investigation"), Burbank
20 PD investigator Lt. Eric Rosoff (Yadon's best friend and business partner) was assigned to
21 investigate. In Lt. Rosoff's first interview with Informant Doe, Plaintiff is informed and believes
22 that she again recanted all of her initial testimony, and indicated that Plaintiff did not tip her off. Lt.
23 Rosoff then contacted Sgt. Thor Merich, who was one of Plaintiff's supervisors at the time of the
24 alleged complaint and a direct witness. Lt. Rosoff proceeded to tell Sgt. Merich to "forget what he
25 knows" about Plaintiff's case when interviewed by investigators. Plaintiff is informed and believes,
26 however, that Sgt. Merich defied Lt. Rosoff and refused to alter his testimony about Plaintiff.

27 10. Thereafter, Sgt. Merich notified his supervisor Omar Rodriguez of this unethical
28 conduct and wrote a formal memo detailing the retaliatory incident (hereinafter, the "Merich

1 Memo"). Plaintiff specifically seeks the "Merich Memo" by way of the within motion, as it bears
2 directly upon unlawful conduct by officers of the Burbank Police Department in the investigation
3 which purportedly lead to Plaintiff's termination. It is unknown whether Lt. Rosoff was ever
4 investigated or disciplined for this conduct, or if any action was taken as a result of the Merich
5 Memo. As a result, and as more fully described below, Plaintiff needs not only to receive the Merich
6 Memo for use in this case, but also to be allowed to depose witness regarding the facts and
7 circumstances regarding the Merich Memo, the investigation and discipline of Lt. Rosoff (if any),
8 and all matters related to the investigation.)

9 11. Furthermore, and during the time that Plaintiff was on administrative leave, he was
10 ordered to appear for several court appearance involving Informant Doe. Plaintiff learned at that
11 time that some of the case files regarding those suspects - which were supposed to be locked in the
12 narcotics office - were missing. Further investigation revealed that Plaintiff's locked desk had been
13 forced open, and that files of the department along with Plaintiff's personal records, logs and notes
14 were stolen. Thereafter, Plaintiff is informed that an informal investigation was initiated into the
15 break-in of the narcotics office (hereinafter, the "Burglary Investigation"). As more fully described
16 below, Plaintiff requests to be allowed to fully inquire into the Burglary Investigation at deposition,
17 and obtain any documents generated in furtherance thereof.

18 12. As a result of the informant investigation, a Brady Letter was issued to Plaintiff,
19 which concluded that Plaintiff had committed certain violations of ethical conduct by tipping off
20 Informant Doe. Chief Stehr then issued a letter of termination for Plaintiff on the same grounds as
21 the Brady Letter.

22 13. Plaintiff has clearly been treated differently than similarly situated members of the
23 BPD. Rosoff himself later became the subject of his own internal investigation involving the kidnap
24 and assault of a suspect in custody under color of authority . During this investigation (with much
25 more serious charges than those against the Plaintiff), Rosoff was sent to patrol duty rather than
26 administrative leave like the Plaintiff, where he received the benefit of overtime (an average of
27 \$25,000 per year for most officers). After his complaint was presented as "sustained," Chief Stehr
28 refused to proceed against him and hired an outside law firm to clear Rosoff's name. This is the

1 same Lt. Rosoff who was accused of attempting to coerce Sgt. Merrich to change his testimony
2 regarding Plaintiff to investigators.

3 14. Accordingly, and as described in much more detail below, Plaintiff requests by the
4 within motion the information contained in the personnel files of Lt. Rosoff and Officer Yadon, and
5 has narrowly tailored this Pitchess motion for that purpose. Further, Plaintiff should be allowed to
6 ask questions about the documents as well as the categories enumerated below at depositions of
7 witnesses in this matter without being subject to an instruction not to answer on Pitchess grounds.
8 These witnesses include, but are not limited to Eric Rosoff, Dan Yadon, Tim Stehr, Thor Merich, a
9 Person Most Knowledgeable from LA-CLEAR, as well as Victor Lewandowski, Michael Webb,
10 Charles Koffman, and Gerardo Misquez, whose declarations appear prominently in Defendant
11 BPD's pending Motion for Summary Judgment.

12 **THE IA INVESTIGATION AND THE MERICH MEMO**

13 15. In the present action, Plaintiff maintains that his termination was discriminatory
14 (based upon his Asian race) and retaliatory (for his reporting of Officer Yadon's racist remarks). As
15 in all such cases, the employer-defendant must articulate a "legitimate nondiscriminatory reason" for
16 the adverse employment action (termination of Plaintiff Dunn). Guz v. Bechtel National, Inc.
17 (2000) 24Cal.4th 317, 355-356.

18 16. Accordingly, the City has articulated performance-based "nondiscriminatory" reasons
19 for Plaintiff's termination. Specifically, the City maintains that Plaintiff Dunn "tipped" the
20 Confidential Informant of his impending arrest by the Culver City PD. The City conducted an
21 Internal Affairs ("IA") investigation which, purportedly, supported its findings and Dunn's
22 termination. By this motion, Plaintiff wishes to conduct discovery into this particular IA
23 investigation, and obtain any relevant evidence (as described in Evidence Code section 250)
24 pertaining to the investigation including, without limitation, the Merich Memo.

25 17. Plaintiff respectfully maintains that by relying on the IA investigation to support
26 Plaintiff Dunn's termination, the Defendant City has placed the entire IA investigation and decision-
27 making process at issue in this case. This includes, without limitation, the manner in which evidence
28 allegedly supporting Plaintiff Dunn's termination was obtained, the content of the information upon

1 which the decision to terminate was based, and whether or not there existed any exculpatory
2 evidence concerning any impropriety in the investigation process.

3 18. Plaintiff wishes to learn the identities of all BPD officers involved in the
4 investigation, and obtain discovery (including depositions) therefrom concerning their respective
5 roles in the investigation, and all actions taken by them in furtherance of the investigation. Plaintiff
6 also wishes to learn the identities of all BPD officers involved in the decision-making process
7 resulting in his termination, and to obtain discovery (including depositions) therefrom concerning
8 their respective roles in the termination, and all actions taken by them in furtherance of the
9 termination. Presumably, this includes Lt. Rosoff and Chief Tim Stehr.

10 19. Plaintiff also seeks by this motion to obtain the Merich Memo from the City. The
11 Merich Memo describes misconduct (if not outright criminal behavior) on the part of Lt. Rosoff
12 during the IA investigation at issue in this case. Any effort to tamper or manipulate the outcome of
13 the IA investigation may well demonstrate that the Defendant City's alleged "nondiscriminatory"
14 reason for the termination was actually pretextual. As such, the Merich Memo is material and
15 relevant to the pending litigation.

16 **OFFICER DAN YADON'S PERSONNEL RECORDS**

17 20. In the present action, Plaintiff maintains that his termination was, at least in part, in
18 retaliation for Plaintiff's reporting of Officer Dan Yadon's racist remarks and statements while
19 Plaintiff was working in the Narcotics detail. Under the holding in Yanowitz v. L'Oreal USA, Inc.
20 (2005) 36 Cal. 4th 1028, 1042, then, Plaintiff Dunn must prove that a "causal link" exists between
21 the protected activity (i.e., the complaints of racist remarks) and his termination.

22 21. Certainly, the proximity in time (only a few weeks between Plaintiff's complaints of
23 Yadon's racist remarks and Plaintiff Dunn's being placed on Administrative Leave) augers in favor
24 establishing the "causal link" described by the Supreme Court in Yanowitz, above: "[s]pecifically,
25 when adverse employment decisions are taken within a reasonable period of time after complaints of
26 discrimination have been made, **retaliatory intent may be inferred.**" Passantino v. Johnson &
27 Johnson Consumer Products, Inc. (9th Cir. 2000) 212 F.3d 493, 507; Mariani-Colon v. Department
28 of Homeland Security ex rel. Chertoff (1st Cir. 2007) 511 F.3d 216, 224 (temporal proximity (2

1 months) between protected activity and discharge sufficient for relatively light burden of establishing
2 prima facie case of retaliation).

3 22. Therefore, Plaintiff wishes to conduct discovery into Officer Dan Yadon's personnel
4 file (including, without limitation, the taking of depositions) to determine whether Officer Yadon
5 actually was demoted and/or disciplined for making racist remarks to Plaintiff Dunn. Plaintiff must
6 have access to how the BPD handled his complaints of harassment, the role it played in Dan Yadon's
7 demotion, why Yadon was demoted to patrol, how Yadon was notified, and how Yadon responded to
8 the allegations. Plaintiff also wishes to explore by way of discovery the exact nature of the
9 relationship between Officer Yadon and Lt. Rosoff, who attempted to illegally influence Sgt. hor
10 Merich's testimony to the IA investigators as described above. This alos will aid Plaintiff in
11 establishing the "causal connection" identified in Yanowitz, above.

12 **LIEUTENANT ERIC ROSOFF'S PERSONNEL RECORDS**

13 23. In the present action, Plaintiff maintains that his termination was affected by the
14 unlawful efforts of Lt. Eric Rosoff. As more fully explained above, Lt. Rosoff is the best friend and
15 business partner of Officer Dan Yadon. Under the holding in Yanowitz v. L'Oreal USA, Inc. (2005)
16 36 Cal. 4th 1028, 1042, then, Plaintiff Dunn must prove that a "causal link" exists between the
17 protected activity (i.e., the complaints of racist remarks against Yadon) and Plaintiff's termination.

18 24. Plaintiff maintains that the close personal and business relationship between Lt.
19 Rossoff and Officer Yadon gives rise to an issue of whether Lt. Rosoff's conduct in attempting to
20 influence Sgt Thor Merich's testimony in Plaintiff's IA investigation was retaliatory in nature or
21 otherwise unlawful.

22 25. Therefore, Plaintiff wishes to conduct discovery into Lieutenant Eric Rosoff's
23 personnel file (including, without limitation, the taking of depositions) to determine whether Lt.
24 Rossoff actually was investigated and/or reprimanded for the conduct described in the Merich
25 Memo. Plaintiff also wishes to explore by way of discovery the exact nature of the relationship
26 between Officer Yadon and Lt. Rosoff, as more fully described above.

27 26. In addition, Plaintiff is informed and believes that a review of Lt. Rosoff's personnel
28 file will reveal that an investigation into a kidnaping charge in 2007/2008 against Lt. Rosoff was

1 sustained by the BPD Deputy Chief and a top Lieutenant. Nevertheless, then Chief Tim Stehr
2 refused to discipline Lt. Rosoff, and instead hired outside lawyers to refute the conclusion of his top
3 officers. Plaintiff believes that this is evidence of disparate treatment of officers by the Burbank
4 Police Department, and is material and relevant to prove that Officer Dunn's discipline (termination)
5 was not appropriate under the circumstances, among other things. This also will aid Plaintiff in
6 establishing the "causal link" identified in Yanowitz, above.

7 BURGLARY INVESTIGATION

8 27. In the present action, Plaintiff maintains that crucial exculpatory documents were
9 stolen from his locked desk in his office. Interestingly, Lt. Rosoff had motive (as Yadon's best
10 friend and business partner) and opportunity (Lt. Rosoff had the key to the offices) to commit the
11 crime. **It is Plaintiff's belief that the burglary investigation, along with the reports and all**
12 **documents attendant thereto, are not personnel records and Plaintiff should be allowed to**
13 **conduct discovery freely without the Pitchess motion.** Nevertheless, this motion is being filed in
14 an abundance of caution, and so Plaintiff may proceed through discovery without further motions of
15 this type.

16 PLAINTIFF'S ENTIRE PERSONNEL FILE

17 28. Defendants have refused to produce a full and complete copy of Plaintiff Dunn's BPD
18 personnel file. This is needed to prove Plaintiff's high level of performance throughout Plaintiff's
19 career with the BPD such as the level of training, promotions, written evaluations, commendations
20 and awards he received. Full access to his benefits and financial records will help to fully establish
21 Plaintiff's damages claims as a result of the wrongful conduct at the hands of the Defendants.
22 Furthermore, any negative items such as reprimands or admonishments that may appear in his
23 personnel file should also be disclosed so that Plaintiff is not unfairly prejudiced by their surprise at
24 trial.

25 29. Additionally, Plaintiff is entitled to his entire personnel file under POBRA
26 (Government Code Section 3306.5(b), which states: "Each employer shall keep each public safety
27 officer's personnel file or a true and correct copy thereof, and shall make the file or copy thereof
28 available within a reasonable period of time after a request therefor by the officer."). As the records

1 and information sought are material to this litigation, their discovery is proper pursuant to Evidence
2 Code sections 1043 and 1045.

3 30. It should be noted that “**the government cannot invoke the (Pitchess) privilege to**
4 **withhold relevant evidence.**” (Garden Grove Police Dept. v. Super. Ct., *Supra*, 89 Cal.App.4th
5 430, 433. (Emphasis added.) Therefore, and pursuant to the holding in Zanone v. The City of
6 Whittier, *Supra*, 162 Cal.App.4th at 187, above, Plaintiff respectfully maintains that the “**relatively**
7 **low threshold for discovery**” has been met in this case, such that Plaintiff should properly be
8 allowed to conduct discovery as more fully described above.

9 **THE BURBANK POLICE DEPARTMENT HAS THE RECORDS SOUGHT**


10 31. Under Evidence Code section 1043(b)(3) the Plaintiff must state “upon reasonable
11 belief that the governmental agency identified has the records or information from the records.” The
12 Declaration of Solomon E. Gresen, filed concurrently with this Motion, states that Plaintiff has
13 reasonable belief that the BPD has the records, since the BPD would necessarily maintain personnel
14 records of its employees, which would include complaints, investigations into conduct, discipline,
15 grievances, demotions, transfers, reprimands, warnings, POBRA notices or other actions.

16 32. With specific reference to the Merich Memo, Plaintiff was ordered to return all copies
17 of said memo on January 7, 2010 to Defendant, so Defendant is obviously in possession.
18 Furthermore, as Defendant BPD handled the informant investigation, it is in possession of those files
19 as well. Therefore, Plaintiff has a reasonable belief that BPD is in possession of all of the records
20 sought herein.

21 33. I am not aware of any other means by which I can obtain the information from the
22 Defendants without this motion being granted.

23 I declare under penalty of perjury under the laws of the State of California that the foregoing
24 is true and correct.

25 Executed this 15th day of June, 2010 at Encino, California

26
27 
28 Solomon E. Gresen

1 SOLOMON E. GRESEN[SBN: 164783]
STEVEN V. RHEUBAN [SBN: 48538]
2 **LAW OFFICES OF RHEUBAN & GRESEN**
15910 VENTURA BOULEVARD, SUITE 1610
3 ENCINO, CALIFORNIA 91436
TELEPHONE: (818) 815-2727
4 FACSIMILE: (818) 815-2737

5 Attorneys for Plaintiff, Christopher Lee Dunn

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF LOS ANGELES - CENTRAL DISTRICT

10
11 CHRISTOPHER LEE DUNN,

12 Plaintiff,

13 -vs-

14 CITY OF BURBANK AND DOES 1
THROUGH 25, INCLUSIVE,

15 Defendants.
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CASE NO.: BC417928

PLAINTIFF'S NOTICE OF PITCHESS
MOTION; PITCHESS MOTION FOR PEACE
OFFICER RECORDS AND INFORMATION;
MEMORANDUM OF POINTS AND
AUTHORITIES; DECLARATION OF
SOLOMON E. GRESEN IN SUPPORT
THEREOF

DATE: July 9, 2010
TIME: 8:30 a.m.
DEPT: 31

Assigned to: Hon. Alan Rosenfield, Judge
Department 31

21 TO ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD:

22 PLEASE TAKE NOTICE THAT ON July 9, 2010 at 8:30 a.m. in Department 31 of the
23 above-entitled Court, Plaintiff CHRISTOPHER DUNN ("Plaintiff"), will move this Court, pursuant
24 to Penal Code sections 832.7 and 832.8 and Evidence Code sections 1043 and 1045, for an order
25 compelling the Defendant City of Burbank ("Defendant") to produce the personnel records of Eric
26 Rosoff, Dan Yadon, Plaintiff, and other peace officers in which the enumerated categories of
27 documents are maintained. This Motion will be made on the grounds that the records are material to
28 the allegations and causes of action set forth by the Plaintiff.

MOTION FOR PEACE OFFICER RECORDS AND INFORMATION

6/15

1 Furthermore, this Motion seeks an order allowing witnesses in this action to disclose, at
2 deposition, information relating to all categories of documents which are sought to be obtained
3 herein, pursuant to Evidence Code sections 1043 and 1045.

4 This Motion shall be based on the attached Points and Authorities, the Declaration of
5 Solomon E. Gresen, the court record on file herein, and all such oral and documentary evidence that
6 shall be presented at the time of the hearing.

7
8 Dated: June 15, 2010

LAW OFFICES OF RHEUBAN & GRESEN

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12 _____
13 SOLOMON E. GRESEN, Esq.
14 Attorneys for Plaintiff, CHRISTOPHER DUNN
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TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY OF ARGUMENT	1
II. ALL PROCEDURAL REQUIREMENTS HAVE BEEN SATISFIED BY PLAINTIFF	4
III. GOOD CAUSE EXISTS FOR THE RECORDS AND INFORMATION SOUGHT IN DISCOVERY	5
1) <u>The IA Investigation and the Merich Memo</u>	6
2) <u>Officer Dan Yadon's Personnel Records</u>	7
3) <u>Lieutenant Eric Rosoff's Personnel Records</u>	9
4) <u>Burglary Investigation</u>	10
5) <u>Plaintiff's entire personnel file</u>	11
IV. A REASONABLE BELIEF EXISTS THAT THE BURBANK POLICE DEPARTMENT HAS THE RECORDS SOUGHT	11
V. THE COURT SHOULD REVIEW THE DOCUMENTS FOR RELEVANCE AND ORDER THOSE DOCUMENTS, AND TESTIMONY REGARDING THOSE DOCUMENTS, TO BE RELEASED TO PLAINTIFF FOR PURPOSES OF THIS ACTION	12
VI. CONCLUSION	13
DECLARATION OF SOLOMON E. GRESEN	14

TABLE OF AUTHORITIES

State Cases

<i>Alford v. Superior Court</i> (2003) 29 Cal 4th 1033	12
<i>Garden Grove Police Dept. v. Super. Ct.</i> (2001) 89 Cal.App.4th 430, 433	5, 7, 8, 10, 11
<i>Guz v. Bechtel National, Inc.</i> (2000) 24Cal.4th 317, 355-356	6
<i>People v. Hustead</i> , (1999) 74 Cal. App. 4th 410	5
<i>Pitchess v. Superior Court</i> (1974) 11 Cal.3d 531	4, 5, 12
<i>Yanowitz v. L'Oreal USA, Inc.</i> (2005) 36 Cal. 4th 1028, 1042	8, 9
<i>Zanone v. The City of Whittier</i> (2008) 162 Cal.App. 4 th 174	5-11

Statutes

California <u>Evidence Code</u> Section 1043	4, 5, 11, 12
California <u>Evidence Code</u> Section 1045	5, 11, 12
California <u>Evidence Code</u> Section 250	6
California <u>Evidence Code</u> Section 915	12
<u>Government Code</u> Section 3306.5(b)	11

Federal Cases

<i>Mariani-Colon v. Department of Homeland Security ex rel. Chertoff</i> (1 st Cir. 2007) 511 F.3d 216, 224	8
<i>Passantino v. Johnson & Johnson Consumer Products, Inc.</i> (9 th Cir. 2000) 212 F.3d 493, 507	8

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

3 The case presents as an action for wrongful termination and assorted claims under the Fair
4 Employment and Housing Act ("FEHA") as well as violations of the Public Safety Officers
5 Procedural Bill of Rights ("POBRA") brought by Christopher Lee Dunn ("Plaintiff") against the
6 Burbank Police Department ("BPD") / City of Burbank. Plaintiff is Asian-American.

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9 detective and selected an assignment as the narcotics detective in the Special Enforcement Detail
10 ("SED") unit. Prior to his arrival at the SED, Plaintiff was told that the incoming Caucasian officers
11 in the SED wanted him to choose another assignment, as the Caucasian officers did not want an
12 Asian detective. Nevertheless, in September 2006, Plaintiff was assigned to the SED under the
13 supervision of Sgt. Duran, and began to quietly outperform all of the Caucasian officers in the SED
14 including, without limitation, Sgt. Dan Yadon.

15 Over time, Plaintiff complained several times to his supervisors about Sgt. Yadon's use of
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17 that an investigation into the matter resulted in discipline to Sgt Yadon, who was in any event
18 demoted and reassigned to the patrol division. As more fully described below, Yadon's best friend
19 and business partner, Lt. Eric Rosoff, later attempted to coerce BPD Sgt. Thor Merich to provide
20 untruthful testimony against Plaintiff.

21 Just a few weeks after Yadon was demoted, Plaintiff received his first complaint as an officer
22 at the BPD. In the complaint, Plaintiff was accused of "tipping off" a drug dealer informant
23 ("Informant Doe") of a pending investigation by the Culver City Police Department ("CCPD").
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25 Plaintiff heard that the CCPD was interested in her, Plaintiff called Sgt. Duran to discuss. Plaintiff
26 was told to continue working with Informant Doe.

27 Informant Doe was later arrested by the CCPD, and was charged with possession of 2 ounces
28 of "dope" with intent to sell. Over the duration of a grueling 6-7 hour interview, in which Informant

1 Doe initially and repeatedly denied receiving any information from Plaintiff concerning CCPD's
2 involvement, Informant Doe was worn down and, in exchange for her release, agreed to testify that
3 Plaintiff had indeed "tipped her off" of the impending arrest. (Though this does not explain why the
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13 recanted all of her initial testimony, and indicated that Plaintiff did not tip her off. Lt. Rosoff then
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23 or disciplined for this conduct, or if any action was taken as a result of the Merich Memo. As a
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25 use in this case, but also to be allowed to depose witness regarding the facts and circumstances
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27 related to the investigation.)

28 //

1 Furthermore, and during the time that Plaintiff was on administrative leave, he was ordered
2 to appear for several court appearance involving Informant Doe. Plaintiff learned at that time that
3 some of the case files regarding those suspects - which were supposed to be locked in the narcotics
4 office - were missing. Further investigation revealed that Plaintiff's locked desk had been forced
5 open, and that files of the department along with Plaintiff's personal records, logs and notes were
6 stolen. Thereafter, Plaintiff is informed that an informal investigation was initiated into the break-in
7 of the narcotics office (hereinafter, the "Burglary Investigation"). As more fully described below,
8 Plaintiff requests to be allowed to fully inquire into the Burglary Investigation at deposition, and
9 obtain any documents generated in furtherance thereof.

10 As a result of the informant investigation, a Brady Letter was issued to Plaintiff, which
11 concluded that Plaintiff had committed certain violations of ethical conduct by tipping off Informant
12 Doe. Chief Stehr then issued a letter of termination for Plaintiff on the same grounds as the Brady
13 Letter.

14 Plaintiff has clearly been treated differently than similarly situated members of the BPD.
15 Rosoff himself later became the subject of his own internal investigation involving the kidnap and
16 assault of a suspect in custody under color of authority. During this investigation (with much more
17 serious charges than those against the Plaintiff), Rosoff was sent to patrol duty rather than
18 administrative leave like the Plaintiff, where he received the benefit of overtime (an average of
19 \$25,000 per year for most officers). After his complaint was presented as "sustained," Chief Stehr
20 refused to proceed against him and hired an outside law firm to clear Rosoff's name. This is the
21 same Lt. Rosoff who was accused of attempting to coerce Sgt. Merrich to change his testimony
22 regarding Plaintiff to investigators.

23 Accordingly, and as described in much more detail below, Plaintiff requests by the within
24 motion the information contained in the personnel file of Lt. Rosoff and Officer Yadon, and has
25 narrowly tailored this Pitchess motion for that purpose. Further, Plaintiff should be allowed to ask
26 questions about the documents as well as the categories enumerated below at depositions of
27 witnesses in this matter without being subject to an instruction not to answer on Pitchess grounds.
28 These witnesses include, but are not limited to Eric Rosoff, Dan Yadon, Tim Stehr, Thor Merich, a

1 Person Most Knowledgeable from LA-CLEAR, as well as Victor Lewandowski, Michael Webb,
2 Charles Koffman, and Gerardo Misquez, whose declarations appear prominently in Defendant
3 BPD's pending Motion for Summary Judgment.

4 **II. ALL PROCEDURAL REQUIREMENTS**

5 **HAVE BEEN SATISFIED BY PLAINTIFF**

6 Disclosure of a peace officer's personnel records are expressly subject to disclosure under
7 California Evidence Code Section 1043 (codifying Pitchess v. Superior Court (1974) 11 Cal.3d 531)
8 which states, in part:

9 " (a) In any case in which discovery or disclosure is sought of peace or custodial
10 officer personnel records... the party seeking the discovery or disclosure shall file a written
11 motion with the appropriate court or administrative body upon written notice to the
12 governmental agency which has custody and control of the records.

13 (b) The motion shall include all of the following:

14 (1) Identification of the proceeding in which discovery or disclosure is sought,
15 the party seeking discovery or disclosure, the peace or custodial officer whose records
16 are sought, the governmental agency which has custody and control of the records,
17 and the time and place at which the motion for discovery or disclosure shall be heard.

18 (2) A description of the type of records or information sought.

19 (3) Affidavits showing good cause for the discovery or disclosure sought,
20 setting forth the materiality thereof to the subject matter involved in the pending
21 litigation and stating upon reasonable belief that the governmental agency identified
22 has the records or information from the records."

23 Plaintiff has met each of these requirements. In compliance with Section 1043(b)(1),
24 Plaintiff has identified the proceeding (the present action), the party (plaintiff), the officers whose
25 records are sought (Eric Rosoff, Dan Yadon, and Plaintiff Dunn), the governmental agency in control
26 of the records (the City of Burbank), and the time and place for the motion.

27 In compliance with Section 1043(b)(2), the records and information sought are described as
28 Plaintiff Dunn's entire personnel file, the personnel file of Officer Dan Yadon (particularly relating

1 to matters involving his transfer from the Narcotics detail and his demotion), the personnel file of Lt.
2 Eric Rosoff (including, without limitation, any investigation or discipline resulting from telling Sgt
3 Thor Merich to lie in the Dunn investigation, and the kidnaping investigation and reasons for failure
4 to discipline), as well as information and records concerning the Burglary Investigation, and all
5 records the reasons for Plaintiff Dunn's termination, including the investigation, decision-making
6 and "Brady" processes, wherever kept or maintained by the City.

7 In compliance with Section 1043(b)(3), declarations are attached showing good cause for the
8 discovery requested. The attached declarations establishes good cause for the discovery of these
9 records, and sets forth their materiality to this litigation and states upon reasonable belief that
10 Defendant County is in possession of these records. This is explained more fully, below, in Section
11 III.

12 Therefore, Plaintiff respectfully maintains that he has met the procedural requirements of a
13 "Pitchess" motion in this case.

14 **III. GOOD CAUSE EXISTS FOR THE RECORDS**
15 **AND INFORMATION SOUGHT IN DISCOVERY**

16 Under Evidence Code Section 1043(b)(3), Plaintiff must show that he has good cause for the
17 release of the personnel records and information. Good cause is a two-part test, shown by first
18 demonstrating the materiality of the information to the pending litigation, and second by stating upon
19 reasonable belief that the agency has the records or information at issue. "This two-part showing of
20 good cause is a **relatively low threshold** for discovery." Zanone v. The City of Whittier (2008) 162
21 Cal.App. 4th 174 at 187 (Emphasis added)(internal citation omitted).

22 Evidence Code sections 1043 and 1045 do not limit discovery of confidential information
23 from police officer personnel files to the types of information mentioned in the statutes or to the facts
24 embraced by Pitchess, **because the government cannot invoke the privilege to withhold relevant**
25 **evidence.** (Garden Grove Police Dept. v. Super. Ct. (2001) 89 Cal.App.4th 430, 433. For the same
26 reason, Pitchess motions may also be used to discover information to impeach an officer's
27 credibility. (People v. Husted, (1999) 74 Cal. App. 4th 410 at 417; Garden Grove, *supra*, 89 Cal.
28 App. 4th at 433).

1 Therefore, not only should the following documents be produced following an in camera
2 hearing, but Plaintiff should be allowed to proceed with a line of questioning about the following
3 items or categories of items at deposition:

4 1) **The IA Investigation and the Merich Memo:**

5 The primary inquiry under Zanone v. The City of Whittier, above, concerns whether the
6 documents or information are material or relevant to the pending litigation. *Supra*, 162 Cal.App.4th
7 at 187. The second inquiry (i.e., whether the City of Burbank is in possession of the records or
8 information at issue) is not disputed, as the Merich Memo, IA investigation paperwork and BPD
9 officers are all under the control of the City of Burbank.

10 In the present action, Plaintiff maintains that his termination was discriminatory (based upon
11 his Asian race) and retaliatory (for his reporting of Officer Yadon's racist remarks). As in all such
12 cases, the employer-defendant must articulate a "legitimate nondiscriminatory reason" for the
13 adverse employment action (termination of Plaintiff Dunn). Guz v. Bechtel National, Inc. (2000) 24
14 Cal.4th 317, 355-356.

15 Accordingly, the City has articulated performance-based "nondiscriminatory" reasons for
16 Plaintiff's termination. Specifically, the City maintains that Plaintiff Dunn "tipped" the Confidential
17 Informant of his impending arrest by the Culver City PD. The City conducted an Internal Affairs
18 ("IA") investigation which, purportedly, supported its findings and Dunn's termination. By this
19 motion, Plaintiff wishes to conduct discovery into this particular IA investigation, and obtain any
20 relevant evidence (as described in Evidence Code section 250) pertaining to the investigation
21 including, without limitation, the Merich Memo.

22 Plaintiff respectfully maintains that by relying on the IA investigation to support Plaintiff
23 Dunn's termination, the Defendant City has placed the entire IA investigation and decision-making
24 process at issue in this case. This includes, without limitation, the manner in which evidence
25 allegedly supporting Plaintiff Dunn's termination was obtained, the content of the information upon
26 which the decision to terminate was based, and whether or not there existed any exculpatory
27 evidence concerning any impropriety in the investigation process.

28 //

1 Plaintiff wishes to learn the identities of all BPD officers involved in the investigation, and
2 obtain discovery (including depositions) therefrom concerning their respective roles in the
3 investigation, and all actions taken by them in furtherance of the investigation. Plaintiff also wishes
4 to learn the identities of all BPD officers involved in the decision-making process resulting in his
5 termination, and to obtain discovery (including depositions) therefrom concerning their respective
6 roles in the termination, and all actions taken by them in furtherance of the termination. Presumably,
7 this includes Lt. Rosoff and Chief Tim Stehr.

8 Plaintiff also seeks by this motion to obtain the Merich Memo from the City. The Merich
9 Memo describes misconduct (if not outright criminal behavior) on the part of Lt. Rosoff during the
10 IA investigation at issue in this case. Any effort to tamper or manipulate the outcome of the IA
11 investigation may well demonstrate that the Defendant City's alleged "nondiscriminatory" reason for
12 the termination was actually pretextual. As such, the Merich Memo is material and relevant to the
13 pending litigation.

14 It should again be noted that "**the government cannot invoke the (Pitchess) privilege to**
15 **withhold relevant evidence.**" (Garden Grove Police Dept. v. Super. Ct., *Supra*, 89 Cal.App.4th
16 430, 433. (Emphasis added.) Therefore, and pursuant to the holding in Zanone v. The City of
17 Whittier, *Supra*, 162 Cal.App.4th at 187, above, Plaintiff respectfully maintains that the "**relatively**
18 **low threshold for discovery**" has been met in this case, such that Plaintiff should properly be
19 allowed to conduct discovery into the IA investigation and obtain the Merich Memo as described
20 above.

21 **2) Officer Dan Yadon's Personnel Records:**

22 As above, the primary inquiry under Zanone v. The City of Whittier, above, concerns
23 whether the documents or information are material or relevant to the pending litigation. *Supra*, 162
24 Cal.App.4th at 187. The second inquiry (i.e., whether the City of Burbank is in possession of the
25 records or information at issue) is not disputed, as the personnel file of Dan Yadon, IA investigation
26 paperwork and BPD officers are all under the control of the City of Burbank.

27 In the present action, Plaintiff maintains that his termination was, at least in part, in
28 retaliation for Plaintiff's reporting of Officer Dan Yadon's racist remarks and statements while

1 Plaintiff was working in the Narcotics detail. Under the holding in Yanowitz v. L'Oreal USA, Inc.
2 (2005) 36 Cal. 4th 1028, 1042, then, Plaintiff Dunn must prove that a "causal link" exists between
3 the protected activity (i.e., the complaints of racist remarks) and his termination.

4 Certainly, the proximity in time (only a few weeks between Plaintiff's complaints of
5 Yadon's racist remarks and Plaintiff Dunn's being placed on Administrative Leave) augers in favor
6 establishing the "causal link" described by the Supreme Court in Yanowitz, above: "[s]pecifically,
7 when adverse employment decisions are taken within a reasonable period of time after complaints of
8 discrimination have been made, **retaliatory intent may be inferred.**" Passantino v. Johnson &
9 Johnson Consumer Products, Inc. (9th Cir. 2000) 212 F.3d 493, 507; Mariani-Colon v. Department
10 of Homeland Security ex rel. Chertoff (1st Cir. 2007) 511 F.3d 216, 224 (temporal proximity (2
11 months) between protected activity and discharge sufficient for relatively light burden of establishing
12 prima facie case of retaliation).

13 Therefore, Plaintiff wishes to conduct discovery into Officer Dan Yadon's personnel file
14 (including, without limitation, the taking of depositions) to determine whether Officer Yadon
15 actually was demoted and/or disciplined for making racist remarks to Plaintiff Dunn. Plaintiff must
16 have access to how the BPD handled his complaints of harassment, the role it played in Dan Yadon's
17 demotion, why Yadon was demoted to patrol, how Yadon was notified, and how Yadon responded to
18 the allegations. Plaintiff also wishes to explore by way of discovery the exact nature of the
19 relationship between Officer Yadon and Lt. Rosoff, who attempted to illegally influence Sgt. hor
20 Merich's testimony to the IA investigators as described above. This also will aid Plaintiff in
21 establishing the "causal connection" identified in Yanowitz, above.

22 It should again be noted that "**the government cannot invoke the (Pitchess) privilege to**
23 **withhold relevant evidence.**" (Garden Grove Police Dept. v. Super. Ct., *Supra*, 89 Cal.App.4th
24 430, 433. (Emphasis added.) Therefore, and pursuant to the holding in Zanone v. The City of
25 Whittier, *Supra*, 162 Cal.App.4th at 187, above, Plaintiff respectfully maintains that the "**relatively**
26 **low threshold for discovery**" has been met in this case, such that Plaintiff should properly be
27 allowed to conduct discovery into Officer Yadon's personnel file and his relationship with Lt.
28 Rosoff.

1 **3) Lieutenant Eric Rosoff's Personnel Records:**

2 As above, the primary inquiry under Zanone v. The City of Whittier, above, concerns
3 whether the documents or information are material or relevant to the pending litigation. *Supra*, 162
4 Cal.App.4th at 187. The second inquiry (i.e., whether the City of Burbank is in possession of the
5 records or information at issue) is not disputed, as the personnel file of Eric Rosoff, IA investigation
6 paperwork and BPD officers are all under the control of the City of Burbank.

7 In the present action, Plaintiff maintains that his termination was affected by the unlawful
8 efforts of Lt. Eric Rosoff. As more fully explained above, Lt. Rosoff is the best friend and business
9 partner of Officer Dan Yadon. Under the holding in Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal.
10 4th 1028, 1042, then, Plaintiff Dunn must prove that a "causal link" exists between the protected
11 activity (i.e., the complaints of racist remarks against Yadon) and Plaintiff's termination.

12 Plaintiff maintains that the close personal and business relationship between Lt. Rossoff and
13 Officer Yadon gives rise to an issue of whether Lt. Rosoff's conduct in attempting to influence Sgt
14 Thor Merich's testimony in Plaintiff's IA investigation was retaliatory in nature or otherwise
15 unlawful.

16 Therefore, Plaintiff wishes to conduct discovery into Lieutenant Eric Rosoff's personnel file
17 (including, without limitation, the taking of depositions) to determine whether Lt. Rossoff actually
18 was investigated and/or reprimanded for the conduct described in the Merich Memo. Plaintiff also
19 wishes to explore by way of discovery the exact nature of the relationship between Officer Yadon
20 and Lt. Rosoff, as more fully described above.

21 In addition, Plaintiff is informed and believes that a review of Lt. Rosoff's personnel file will
22 reveal that an investigation into a kidnaping charge in 2007/2008 against Lt. Rosoff was sustained by
23 the BPD Deputy Chief and a top Lieutenant. Nevertheless, then Chief Tim Stehr refused to
24 discipline Lt. Rosoff, and instead hired outside lawyers to refute the conclusion of his top officers.
25 Plaintiff believes that this is evidence of disparate treatment of officers by the Burbank Police
26 Department, and is material and relevant to prove that Officer Dunn's discipline (termination) was
27 not appropriate under the circumstances, among other things. This also will aid Plaintiff in
28 establishing the "causal link" identified in Yanowitz, above.

1 It should again be noted that **“the government cannot invoke the (Pitchess) privilege to**
2 **withhold relevant evidence.”** (Garden Grove Police Dept. v. Super. Ct., *Supra*, 89 Cal.App.4th
3 430, 433. (Emphasis added.) Therefore, and pursuant to the holding in Zanone v. The City of
4 Whittier, *Supra*, 162 Cal.App.4th at 187, above, Plaintiff respectfully maintains that the **“relatively**
5 **low threshold for discovery”** has been met in this case, such that Plaintiff should properly be
6 allowed to conduct discovery into Lt. Rosoff’s personnel file and his relationship with Officer
7 Yadon.

8 **4) Burglary Investigation:**

9 As above, the primary inquiry under Zanone v. The City of Whittier, above, concerns
10 whether the documents or information are material or relevant to the pending litigation. *Supra*, 162
11 Cal.App.4th at 187. The second inquiry (i.e., whether the City of Burbank is in possession of the
12 records or information at issue) is not disputed, as the Burglary Investigation, and all paperwork
13 attendant thereto, are under the control of the City of Burbank.

14 In the present action, Plaintiff maintains that crucial exculpatory documents were stolen from
15 his locked desk in his office. Interestingly, Lt. Rosoff had motive (as Yadon’s best friend and
16 business partner) and opportunity (Lt. Rosoff had the key to the offices) to commit the crime. **It is**
17 **Plaintiff’s belief that the burglary investigation, along with the reports and all documents**
18 **attendant thereto, are not personnel records and Plaintiff should be allowed to conduct**
19 **discovery freely without the Pitchess motion.** Nevertheless, this motion is being filed in an
20 abundance of caution, and so Plaintiff may proceed through discovery without further motions of this
21 type.

22 It should again be noted that **“the government cannot invoke the (Pitchess) privilege to**
23 **withhold relevant evidence.”** (Garden Grove Police Dept. v. Super. Ct., *Supra*, 89 Cal.App.4th
24 430, 433. (Emphasis added.) Therefore, and pursuant to the holding in Zanone v. The City of
25 Whittier, *Supra*, 162 Cal.App.4th at 187, above, Plaintiff respectfully maintains that the **“relatively**
26 **low threshold for discovery”** has been met in this case, such that Plaintiff should properly be
27 allowed to conduct discovery into the Burglary Investigation as more fully described above.

28 //

1 **5) Plaintiff's entire personnel file:**

2 Defendants have refused to produce a full and complete copy of Plaintiff Dunn's BPD
3 personnel file. This is needed to prove Plaintiff's high level of performance throughout Plaintiff's
4 career with the BPD such as the level of training, promotions, written evaluations, commendations
5 and awards he received. Full access to his benefits and financial records will help to fully establish
6 Plaintiff's damages claims as a result of the wrongful conduct at the hands of the Defendants.
7 Furthermore, any negative items such as reprimands or admonishments that may appear in his
8 personnel file should also be disclosed so that Plaintiff is not unfairly prejudiced by their surprise at
9 trial.

10 Additionally, Plaintiff is entitled to his entire personnel file under POBRA (Government
11 Code Section 3306.5(b), which states: "Each employer shall keep each public safety officer's
12 personnel file or a true and correct copy thereof , and shall make the file or copy thereof available
13 within a reasonable period of time after a request therefor by the officer."). As the records and
14 information sought are material to this litigation, their discovery is proper pursuant to Evidence Code
15 sections 1043 and 1045.

16 It should again be noted that "the government cannot invoke the (Pitchess) privilege to
17 withhold relevant evidence." (Garden Grove Police Dept. v. Super. Ct., *Supra*, 89 Cal.App.4th
18 430, 433. (Emphasis added.) Therefore, and pursuant to the holding in Zanone v. The City of
19 Whittier, *Supra*, 162 Cal.App.4th at 187, above, Plaintiff respectfully maintains that the "relatively
20 low threshold for discovery" has been met in this case, such that Plaintiff should properly be
21 allowed to his own personnel file as more fully described above.

22 **IV. A REASONABLE BELIEF EXISTS THAT THE**
23 **BURBANK POLICE DEPARTMENT HAS THE RECORDS SOUGHT**

24 Under Evidence Code section 1043(b)(3) the Plaintiff must state "upon reasonable belief that
25 the governmental agency identified has the records or information from the records." The
26 Declaration of Solomon E. Gresen, filed concurrently with this Motion, states that Plaintiff has
27 reasonable belief that the BPD has the records, since the BPD would necessarily maintain personnel
28 records of its employees, which would include complaints, investigations into conduct, discipline,

1 grievances, demotions, transfers, reprimands, warnings, POBRA notices or other actions. With
2 specific reference to the Merich Memo, Plaintiff was ordered to return all copies of said memo on
3 January 7, 2010 to Defendant, so Defendant is obviously in possession. Furthermore, as Defendant
4 BPD handled the informant investigation, it is in possession of those files as well. Therefore,
5 Plaintiff has a reasonable belief that BPD is in possession of all of the records sought herein.

6 **V. THE COURT SHOULD REVIEW THE DOCUMENTS FOR RELEVANCE AND**
7 **ORDER THOSE DOCUMENTS, AND TESTIMONY REGARDING THOSE DOCUMENTS,**
8 **TO BE RELEASED TO PLAINTIFF FOR PURPOSES OF THIS ACTION**

9 A finding of "good cause" under Evidence Code § 1043(b) is the first step in the Pitchess
10 process. In addition to the exclusion of specific categories of information from disclosure, Evidence
11 Code § 1045 next establishes general criteria to guide the court's determination for disclosure of
12 relevant information and insure that the privacy interests of the officers subject to the Pitchess
13 motion are protected. Alford v. Superior Court (2003) 29 Cal 4th 1033. Evidence Code § 1045(b)
14 provides that the court shall then examine the information "in chambers" in conformity with
15 Evidence Code § 915 (i.e. out of the presence of all persons except the person authorized to claim
16 the privilege and such other persons as he or she is willing to have present), and shall exclude from
17 disclosure several enumerated categories of information, including: (1) complaints "concerning
18 conduct occurring more than five years before the event or transaction that is the subject of the
19 litigation," (2) the conclusions of any officer investigating a criminal complaint, and (3) facts which
20 are so remote as to make disclosure of little or no practical benefit. *Ibid.*

21 To help guide the Court in making its determination, Plaintiff is not seeking any information
22 regarding complaints concerning conduct that dates earlier than June 1996 (five years prior to his
23 hire by the BPD). (See Evidence Code Section 1045(b)(1)). Evidence Code Section 1045(b)(2) does
24 not apply since this is not a criminal proceeding. Finally, Plaintiff has conveyed the direct relevance
25 of the categories sought in Section IV of motion and in the attached declaration.

26 //

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28 //

1 Therefore, Plaintiff urges the Court to review the documents in camera and allow Plaintiff his
2 right of access to the documents. Further, Plaintiff asks that the Court allow Plaintiff access to
3 testimony regarding the documents and categories above, as information that the Court finds
4 "relevant" may only be discovered during the deposition of witnesses.

5 **VI. CONCLUSION**

6 As Plaintiff has established good cause for the production of the peace officer personnel
7 records sought herein, the Court should grant this motion.

8
9 DATE: June 15, 2010

LAW OFFICES OF RHEUBAN & GRESEN

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11 By: 
12 Solomon E. Gresen
13 Attorneys for Plaintiff, Christopher Lee Dunn
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1 6. Just a few weeks after Yadon was demoted, Plaintiff received his first complaint as an
2 officer at the BPD. In the complaint, Plaintiff was accused of "tipping off" a drug dealer informant
3 ("Informant Doe") of a pending investigation by the Culver City Police Department ("CCPD").
4 Informant Doe had previously been Plaintiff's informant in a number of narcotics cases, so when
5 Plaintiff heard that the CCPD was interested in her, Plaintiff called Sgt. Duran to discuss. Plaintiff
6 was told to continue working with Informant Doe.

7 7. Informant Doe was later arrested by the CCPD, and was charged with possession of 2
8 ounces of "dope" with intent to sell. Over the duration of a grueling 6-7 hour interview, in which
9 Informant Doe initially and repeatedly denied receiving any information from Plaintiff concerning
10 CCPD's involvement, Informant Doe was worn down and, in exchange for her release, agreed to
11 testify that Plaintiff had indeed "tipped her off" of the impending arrest. (Though this does not
12 explain why the Confidential Informant still had 2 ounces of "dope" in her possession at the time of
13 the arrest.)

14 8. The very next day, Informant Doe wrote a 14 page letter to the CCPD, recanting her
15 story and indicating that the only reason that she told them that Plaintiff had tipped her off was
16 because they promised to let her go home instead of being arrested. For her troubles, plaintiff is
17 informed and believes that Informant Doe was promptly rearrested and charged. Plaintiff was then
18 placed on Administrative Leave with pay pending an investigation.

19 9. In the first few weeks of the BPD investigation ("Informant Investigation"), Burbank
20 PD investigator Lt. Eric Rosoff (Yadon's best friend and business partner) was assigned to
21 investigate. In Lt. Rosoff's first interview with Informant Doe, Plaintiff is informed and believes
22 that she again recanted all of her initial testimony, and indicated that Plaintiff did not tip her off. Lt.
23 Rosoff then contacted Sgt. Thor Merich, who was one of Plaintiff's supervisors at the time of the
24 alleged complaint and a direct witness. Lt. Rosoff proceeded to tell Sgt. Merich to "forget what he
25 knows" about Plaintiff's case when interviewed by investigators. Plaintiff is informed and believes,
26 however, that Sgt. Merich defied Lt. Rosoff and refused to alter his testimony about Plaintiff.

27 10. Thereafter, Sgt. Merich notified his supervisor Omar Rodriguez of this unethical
28 conduct and wrote a formal memo detailing the retaliatory incident (hereinafter, the "Merich

1 Memo"). Plaintiff specifically seeks the "Merich Memo" by way of the within motion, as it bears
2 directly upon unlawful conduct by officers of the Burbank Police Department in the investigation
3 which purportedly lead to Plaintiff's termination. It is unknown whether Lt. Rosoff was ever
4 investigated or disciplined for this conduct, or if any action was taken as a result of the Merich
5 Memo. As a result, and as more fully described below, Plaintiff needs not only to receive the Merich
6 Memo for use in this case, but also to be allowed to depose witness regarding the facts and
7 circumstances regarding the Merich Memo, the investigation and discipline of Lt. Rosoff (if any),
8 and all matters related to the investigation.)

9 11. Furthermore, and during the time that Plaintiff was on administrative leave, he was
10 ordered to appear for several court appearance involving Informant Doe. Plaintiff learned at that
11 time that some of the case files regarding those suspects - which were supposed to be locked in the
12 narcotics office - were missing. Further investigation revealed that Plaintiff's locked desk had been
13 forced open, and that files of the department along with Plaintiff's personal records, logs and notes
14 were stolen. Thereafter, Plaintiff is informed that an informal investigation was initiated into the
15 break-in of the narcotics office (hereinafter, the "Burglary Investigation"). As more fully described
16 below, Plaintiff requests to be allowed to fully inquire into the Burglary Investigation at deposition,
17 and obtain any documents generated in furtherance thereof.

18 12. As a result of the informant investigation, a Brady Letter was issued to Plaintiff,
19 which concluded that Plaintiff had committed certain violations of ethical conduct by tipping off
20 Informant Doe. Chief Stehr then issued a letter of termination for Plaintiff on the same grounds as
21 the Brady Letter.

22 13. Plaintiff has clearly been treated differently than similarly situated members of the
23 BPD. Rosoff himself later became the subject of his own internal investigation involving the kidnap
24 and assault of a suspect in custody under color of authority . During this investigation (with much
25 more serious charges than those against the Plaintiff), Rosoff was sent to patrol duty rather than
26 administrative leave like the Plaintiff, where he received the benefit of overtime (an average of
27 \$25,000 per year for most officers). After his complaint was presented as "sustained," Chief Stehr
28 refused to proceed against him and hired an outside law firm to clear Rosoff's name. This is the

1 same Lt. Rosoff who was accused of attempting to coerce Sgt. Merrich to change his testimony
2 regarding Plaintiff to investigators.

3 14. Accordingly, and as described in much more detail below, Plaintiff requests by the
4 within motion the information contained in the personnel filed of Lt. Rosoff and Officer Yadon, and
5 has narrowly tailored this Pitchess motion for that purpose. Further, Plaintiff should be allowed to
6 ask questions about the documents as well as the categories enumerated below at depositions of
7 witnesses in this matter without being subject to an instruction not to answer on Pitchess grounds.
8 These witnesses include, but are not limited to Eric Rosoff, Dan Yadon, Tim Stehr, Thor Merich, a
9 Person Most Knowledgeable from LA-CLEAR, as well as Victor Lewandowski, Michael Webb,
10 Charles Koffman, and Gerardo Misque, whose declarations appear prominently in Defendant
11 BPD's pending Motion for Summary Judgment.

12 **THE IA INVESTIGATION AND THE MERICH MEMO**

13 15. In the present action, Plaintiff maintains that his termination was discriminatory
14 (based upon his Asian race) and retaliatory (for his reporting of Officer Yadon's racist remarks). As
15 in all such cases, the employer-defendant must articulate a "legitimate nondiscriminatory reason" for
16 the adverse employment action (termination of Plaintiff Dunn). Guz v. Bechtel National, Inc.
17 (2000) 24Cal.4th 317, 355-356.

18 16. Accordingly, the City has articulated performance-based "nondiscriminatory" reasons
19 for Plaintiff's termination. Specifically, the City maintains that Plaintiff Dunn "tipped" the
20 Confidential Informant of his impending arrest by the Culver City PD. The City conducted an
21 Internal Affairs ("IA") investigation which, purportedly, supported its findings and Dunn's
22 termination. By this motion, Plaintiff wishes to conduct discovery into this particular IA
23 investigation, and obtain any relevant evidence (as described in Evidence Code section 250)
24 pertaining to the investigation including, without limitation, the Merich Memo.

25 17. Plaintiff respectfully maintains that by relying on the IA investigation to support
26 Plaintiff Dunn's termination, the Defendant City has placed the entire IA investigation and decision-
27 making process at issue in this case. This includes, without limitation, the manner in which evidence
28 allegedly supporting Plaintiff Dunn's termination was obtained, the content of the information upon

1 which the decision to terminate was based, and whether or not there existed any exculpatory
2 evidence concerning any impropriety in the investigation process.

3 18. Plaintiff wishes to learn the identities of all BPD officers involved in the
4 investigation, and obtain discovery (including depositions) therefrom concerning their respective
5 roles in the investigation, and all actions taken by them in furtherance of the investigation. Plaintiff
6 also wishes to learn the identities of all BPD officers involved in the decision-making process
7 resulting in his termination, and to obtain discovery (including depositions) therefrom concerning
8 their respective roles in the termination, and all actions taken by them in furtherance of the
9 termination. Presumably, this includes Lt. Rosoff and Chief Tim Stehr.

10 19. Plaintiff also seeks by this motion to obtain the Merich Memo from the City. The
11 Merich Memo describes misconduct (if not outright criminal behavior) on the part of Lt. Rosoff
12 during the IA investigation at issue in this case. Any effort to tamper or manipulate the outcome of
13 the IA investigation may well demonstrate that the Defendant City's alleged "nondiscriminatory"
14 reason for the termination was actually pretextual. As such, the Merich Memo is material and
15 relevant to the pending litigation.

16 OFFICER DAN YADON'S PERSONNEL RECORDS

17 20. In the present action, Plaintiff maintains that his termination was, at least in part, in
18 retaliation for Plaintiff's reporting of Officer Dan Yadon's racist remarks and statements while
19 Plaintiff was working in the Narcotics detail. Under the holding in Yanowitz v. L'Oreal USA, Inc.
20 (2005) 36 Cal. 4th 1028, 1042, then, Plaintiff Dunn must prove that a "causal link" exists between
21 the protected activity (i.e., the complaints of racist remarks) and his termination.

22 21. Certainly, the proximity in time (only a few weeks between Plaintiff's complaints of
23 Yadon's racist remarks and Plaintiff Dunn's being placed on Administrative Leave) augers in favor
24 establishing the "causal link" described by the Supreme Court in Yanowitz, above: "[s]pecifically,
25 when adverse employment decisions are taken within a reasonable period of time after complaints of
26 discrimination have been made, **retaliatory intent may be inferred.**" Passantino v. Johnson &
27 Johnson Consumer Products, Inc. (9th Cir. 2000) 212 F.3d 493, 507; Mariani-Colon v. Department
28 of Homeland Security ex rel. Chertoff (1st Cir. 2007) 511 F.3d 216, 224 (temporal proximity (2

1 months) between protected activity and discharge sufficient for relatively light burden of establishing
2 prima facie case of retaliation).

3 22. Therefore, Plaintiff wishes to conduct discovery into Officer Dan Yadon's personnel
4 file (including, without limitation, the taking of depositions) to determine whether Officer Yadon
5 actually was demoted and/or disciplined for making racist remarks to Plaintiff Dunn. Plaintiff must
6 have access to how the BPD handled his complaints of harassment, the role it played in Dan Yadon's
7 demotion, why Yadon was demoted to patrol, how Yadon was notified, and how Yadon responded to
8 the allegations. Plaintiff also wishes to explore by way of discovery the exact nature of the
9 relationship between Officer Yadon and Lt. Rosoff, who attempted to illegally influence Sgt. hor
10 Merich's testimony to the IA investigators as described above. This alos will aid Plaintiff in
11 establishing the "causal connection" identified in Yanowitz, above.

12 **LIEUTENANT ERIC ROSOFF'S PERSONNEL RECORDS**

13 23. In the present action, Plaintiff maintains that his termination was affected by the
14 unlawful efforts of Lt. Eric Rosoff. As more fully explained above, Lt. Rosoff is the best friend and
15 business partner of Officer Dan Yadon. Under the holding in Yanowitz v. L'Oreal USA, Inc. (2005)
16 36 Cal. 4th 1028, 1042, then, Plaintiff Dunn must prove that a "causal link" exists between the
17 protected activity (i.e., the complaints of racist remarks against Yadon) and Plaintiff's termination.

18 24. Plaintiff maintains that the close personal and business relationship between Lt.
19 Rossoff and Officer Yadon gives rise to an issue of whether Lt. Rosoff's conduct in attempting to
20 influence Sgt Thor Merich's testimony in Plaintiff's IA investigation was retaliatory in nature or
21 otherwise unlawful.

22 25. Therefore, Plaintiff wishes to conduct discovery into Lieutenant Eric Rosoff's
23 personnel file (including, without limitation, the taking of depositions) to determine whether Lt.
24 Rossoff actually was investigated and/or reprimanded for the conduct described in the Merich
25 Memo. Plaintiff also wishes to explore by way of discovery the exact nature of the relationship
26 between Officer Yadon and Lt. Rosoff, as more fully described above.

27 26. In addition, Plaintiff is informed and believes that a review of Lt. Rosoff's personnel
28 file will reveal that an investigation into a kidnaping charge in 2007/2008 against Lt. Rosoff was

1 sustained by the BPD Deputy Chief and a top Lieutenant. Nevertheless, then Chief Tim Stehr
2 refused to discipline Lt. Rosoff, and instead hired outside lawyers to refute the conclusion of his top
3 officers. Plaintiff believes that this is evidence of disparate treatment of officers by the Burbank
4 Police Department, and is material and relevant to prove that Officer Dunn's discipline (termination)
5 was not appropriate under the circumstances, among other things. This also will aid Plaintiff in
6 establishing the "causal link" identified in Yanowitz, above.

7 BURGLARY INVESTIGATION

8 27. In the present action, Plaintiff maintains that crucial exculpatory documents were
9 stolen from his locked desk in his office. Interestingly, Lt. Rosoff had motive (as Yadon's best
10 friend and business partner) and opportunity (Lt. Rosoff had the key to the offices) to commit the
11 crime. **It is Plaintiff's belief that the burglary investigation, along with the reports and all**
12 **documents attendant thereto, are not personnel records and Plaintiff should be allowed to**
13 **conduct discovery freely without the Pitchess motion.** Nevertheless, this motion is being filed in
14 an abundance of caution, and so Plaintiff may proceed through discovery without further motions of
15 this type.

16 PLAINTIFF'S ENTIRE PERSONNEL FILE

17 28. Defendants have refused to produce a full and complete copy of Plaintiff Dunn's BPD
18 personnel file. This is needed to prove Plaintiff's high level of performance throughout Plaintiff's
19 career with the BPD such as the level of training, promotions, written evaluations, commendations
20 and awards he received. Full access to his benefits and financial records will help to fully establish
21 Plaintiff's damages claims as a result of the wrongful conduct at the hands of the Defendants.
22 Furthermore, any negative items such as reprimands or admonishments that may appear in his
23 personnel file should also be disclosed so that Plaintiff is not unfairly prejudiced by their surprise at
24 trial.

25 29. Additionally, Plaintiff is entitled to his entire personnel file under POBRA
26 (Government Code Section 3306.5(b), which states: "Each employer shall keep each public safety
27 officer's personnel file or a true and correct copy thereof, and shall make the file or copy thereof
28 available within a reasonable period of time after a request therefor by the officer."). As the records

1 and information sought are material to this litigation, their discovery is proper pursuant to Evidence
2 Code sections 1043 and 1045.

3 30. It should be noted that "the government cannot invoke the (Pitchess) privilege to
4 withhold relevant evidence." (Garden Grove Police Dept. v. Super. Ct., *Supra*, 89 Cal.App.4th
5 430, 433. (Emphasis added.) Therefore, and pursuant to the holding in Zanone v. The City of
6 Whittier, *Supra*, 162 Cal.App.4th at 187, above, Plaintiff respectfully maintains that the "relatively
7 low threshold for discovery" has been met in this case, such that Plaintiff should properly be
8 allowed to conduct discovery as more fully described above.

9 **THE BURBANK POLICE DEPARTMENT HAS THE RECORDS SOUGHT**

10 31. Under Evidence Code section 1043(b)(3) the Plaintiff must state "upon reasonable
11 belief that the governmental agency identified has the records or information from the records." The
12 Declaration of Solomon E. Gresen, filed concurrently with this Motion, states that Plaintiff has
13 reasonable belief that the BPD has the records, since the BPD would necessarily maintain personnel
14 records of its employees, which would include complaints, investigations into conduct, discipline,
15 grievances, demotions, transfers, reprimands, warnings, POBRA notices or other actions.

16 32. With specific reference to the Merich Memo, Plaintiff was ordered to return all copies
17 of said memo on January 7, 2010 to Defendant, so Defendant is obviously in possession.
18 Furthermore, as Defendant BPD handled the informant investigation, it is in possession of those files
19 as well. Therefore, Plaintiff has a reasonable belief that BPD is in possession of all of the records
20 sought herein.

21 33. I am not aware of any other means by which I can obtain the information from the
22 Defendants without this motion being granted.

23 I declare under penalty of perjury under the laws of the State of California that the foregoing
24 is true and correct.

25 Executed this 15th day of June, 2010 at Encino, California

26
27 
28 Solomon E. Gresen